



U.S. Merit Systems Protection Board

CASE REPORT

DATE: May 4, 2007

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BOARD DECISIONS

Robert L. Jones v. Office of Personnel Management, 2007 MSPB 123

MSPB Docket No. CH-844E-06-0636-I-1

May 2, 2007

Timeliness

- Miscellaneous

Member Sapin dissented from the majority's denial of the appellant's petition for review of the initial decision dismissing the appellant's untimely disability retirement appeal. Member Sapin would have excused the appellant's untimely filing based on the following: the appellant contacted an attorney two weeks before the deadline and "thought that everything was tak[en] care of;" one week before the deadline and while in Tennessee to visit his terminally ill mother, he contacted his attorney to learn the status of his case and was told to call OPM and ask that OPM return his attorney's calls; when the appellant returned home after the filing deadline had passed and learned that his attorney had not filed the appeal, he filed his appeal pro se; the record contains a favorable decision from the Social Security Administration's Office of Disability Adjudication and Review finding that the appellant has such severe pain and limitation of motion that he is unable to work; and, because this is a disability retirement appeal, any doubt as to whether the Board should waive the filing deadline should be resolved in the appellant's favor.

Wyeroski v. Department of Transportation, 2007 MSPB 124

MSPB Docket No. NY-0752-03-00080-I-1

May 2, 2007

Timeliness

- New evidence/Argument

The Board dismissed as an untimely filed petition for review the appellant's February 5, 2007 request to reopen the June 3, 2003 initial decision affirming his removal. The Board found no basis to waive its filing deadline where the appellant's explanation for the untimeliness was not in the form of an affidavit or statement signed under penalty of perjury. Additionally, the Board found that the new evidence offered by the appellant to impeach the credibility of one of the witnesses, the office manager, was not of sufficient weight to warrant a different outcome, especially where, as here, the administrative judge relied upon documentary evidence and the testimony of a number of witnesses in addition to that of the office manager in affirming the removal action.

COURT DECISIONS

Meyer v. Office of Personnel Management (NP)

Fed. Cir. No. 2006-3300; MSPB Docket No. CH-844E-05-0173-I-1

May 1, 2007

Retirement

- Disability Retirement**
- Procedures/Miscellaneous**

The Federal Circuit vacated and remanded the above case for consideration of petitioner's petition for Board review of an initial decision affirming the Office of Personnel Management's denial of petitioner's application for disability retirement. The Court found that the medical documentation presented to the full Board on review contained an explanation for why the material was previously unavailable and also provided evidence of a mental disability existing less than a year before petitioner was removed from employment. While the Court noted that the Board might have concluded that the explanation of petitioner's untimely submission of new information was unconvincing, the Court stated that the account of petitioner's mental problems was uncontradicted and sufficiently strong as to require the Board to have explained why it found petitioner's submission unpersuasive.

FEDERAL REGISTER NOTICES

72 Fed. Reg. 23772-23775 (May 1, 2007)

OPM issued a proposed regulation amending its regulations governing adverse actions in the competitive or excepted service and related regulations pertaining to probationary periods, found at 5 CFR part 752 (Subpart D) and 5 CFR part 315 (Subpart H) respectively. The proposed regulation was added to conform to decisions of the Federal Circuit in *Van Wersch v. Department of Health and Human Services*, 197 F.3d 1144 (Fed. Cir. 1999) and *McCormick v. Department of the Air Force*, 307 F.3d 1339 (Fed. Cir. 2002). Consistent with those opinions, the proposed regulation provides additional procedural and appeal rights to individuals who are serving a probationary period in the competitive service or a trial period in the excepted service if they have sufficient “current continuous service” to qualify as “employees” with those rights under 5 U.S.C. § 7511.